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September 18, 2019

Via NYSCEF and Hand Delivery

Hon. O. Peter Sherwood
Supreme Court of the State of New York
Commercial Division, Part 49
60 Centre Street, Room 252
New York, New York 10007

Re: *Perella Weinberg Partners LLC, et al. v. Kramer, et al.*, Index No. 653488/2015

Dear Justice Sherwood:

On behalf of Defendants, Counterclaim-Plaintiffs and Cross-Claim Plaintiffs Michael A. Kramer and Derron S. Slonecker, we respectfully request that the Court schedule a conference to address (i) a series of misrepresentations directed to this Court and the First Department; and (ii) discovery misconduct undertaken by PWP and its counsel that has prejudiced our clients in connection with their right to deferred compensation they earned over seven years ago.

As set forth in more detail below, recent reports reflecting internal conversations and documents from PWP's counsel, Weil, Gotshal & Manges LLP ("Weil"), indicate that PWP and Weil ***intentionally concealed material information*** from Kramer and Slonecker that would have entitled them to payment of their deferred compensation. PWP further made numerous misrepresentations both to this Court and to the First Department related to this issue. As a result, significant time and money has been spent litigating frivolous claims and defenses relating to approximately $10.5 million of ***earned compensation*** that PWP knew was owed to Kramer and Slonecker over seven years ago. PWP's misconduct further resulted in the expenditure of significant resources of the parties and this Court on irrelevant discovery issues, while potentially relevant issues remain wholly unresolved after four years of discovery.

I. Kramer and Slonecker's Deferred Compensation Claim

As the Court will recall, Kramer and Slonecker seek deferred compensation amounts, plus interest, to which they are contractually owed by PWP. Specifically, in 2007, Kramer and Slonecker entered into agreements pursuant to which they received deferred compensation in the amounts of $9,153,846.15 and $1,307,692.31, respectively (the "2007 DCAs"). This compensation was consideration for "***services [to be provided by Kramer and Slonecker] for a period of up to five years***," and was payable (except in the event of a termination for Cause) on the "fifth anniversary of the Effective Date" of the contract. (*See* 2007 DCA § 4.) As the contract's effective date was January 1, 2007, such compensation was due on January 1, 2012 (the "Original Payment Date").

There is no dispute that Kramer and Slonecker provided five years of services to PWP, from 2007 to 2012, satisfying their obligations under the 2007 DCAs. In 2011, however, as the

Original Payment Date approached, PWP was soliciting third-party investors to "re-up" their financial commitments to PWP. PWP's then-Chief Financial Officer Aaron Hood explained to PWP partners that these third-party investors would be "highly interested" in whether PWP's partners would renew their capital commitments to the firm. (PWP0026352.) To this end, in May 2011, PWP approached Kramer and Slonecker (among others) and asked them to forgo receipt of their deferred compensation until the earlier of another five years or their separation from the firm for any reason.

Contemporaneous documents make clear that PWP falsely assured Kramer and Slonecker (and other PWP partners) in writing that such election would be valid so long as it was executed by June 1, 2011.[1] (PWP0026352.) PWP also assured Kramer and Slonecker (and other PWP partners) in writing that the deferred compensation would be fully vested and no longer subject to forfeiture.[2] PWP sent Kramer and Slonecker Subsequent Deferral Election forms (the "2011 Election Forms") that provided, *in full*, as follows:

> I elect to defer the payment of 100% of my Deferred Compensation Amount . . . currently payable on June 1, 2012 (the "Payment Date"), in accordance with the terms of the Deferred Compensation Agreement, as amended, dated May 30, 2007, until the earlier to occur of my separation from service or the fifth anniversary of the Payment Date.

(NYSCEF Doc. Nos. 21 & 26.)

Thus, the 2011 Election Forms omit the 2007 DCAs' requirement that a partner's departure be "without Cause." (*Id.*) Rather, because the deferred compensation was fully earned and vested, such compensation would be paid upon a partner's separation from service for any reason. (*Id.*)

II. PWP Withholds Deferred Compensation

Notwithstanding PWP's prior commitments, upon their termination in 2015, PWP refused Kramer and Slonecker's request for payment of their deferred compensation. Instead, PWP informed each in writing as follows:

> You were notified on February 16, 2015 that your tenure with the Firm would be terminated for Cause, effective as of May 17, 2015 (the "Termination

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[1] This representation was false. Under Internal Revenue Code Section 409A, an election to further defer receipt of deferred compensation is not valid unless such election is made at ***least 12 months before*** the original payment date. Thus, for Kramer and Slonecker (and other PWP partners), an election to further extend such payment date would not be valid unless it was made on or before December 31, 2010—which is at least 12 months before the Original Payment Date of January 1, 2012.

[2] *See, e.g.*, Hood Email dated May 13, 2011 [PWP0026352] (noting "significant structural changes . . . to ensure that there is full recognition that this capital is earned and vested by the participants"); PWP0026361 (providing that DCA provisions continue to apply "***except*** the provisions . . . regarding forfeiture for Cause" (emphasis added)); *id.* (reiterating that there would be "[n]o loss if terminated for Cause"); PWP0026402 (same).

> Date"). ***This letter is to inform you that, pursuant to Section 4 of the [2007] DCA, your Compensation under the [2007] DCA will be forfeited in full on the Termination Date.***

(PWP0035160; PWP0035155 (emphasis added).)

Left with no alternative, Kramer and Slonecker filed counterclaims against PWP and moved for summary judgment on this issue, relying on the plain language of the 2011 Election Forms. (NYSCEF Doc. Nos. 12, 16-28.) PWP's Opposition to this motion was due on or before December 14, 2015 (NYSCEF Doc. No. 54)—almost two weeks ***after*** PWP's counsel had admitted PWP owed Kramer and Slonecker this money.

III. PWP Conceals Dispositive Information from Kramer and Slonecker

Indeed, on August 22, 2019, the *New York Post* published an investigative report revealing that PWP's counsel had, for years, ***intentionally concealed material information*** that would have entitled Kramer and Slonecker to payment in full of their deferred compensation regardless of their status at PWP.

Specifically, on December 3, 2015 (11 days before PWP's opposition to Kramer and Slonecker's summary judgment motion was due), Weil partners Nicholas Pappas (counsel of record for PWP in this action) and Michael Nissan (head of Weil's private equity compensation and benefits practice) concluded that the 2011 Election Forms violated Internal Revenue Code Section 409A. (Ex. A.) ***Because the 2011 deferrals were invalid, such compensation was payable (and thus taxable) as of the Original Payment Date of January 1, 2012***. (*See id.* (indicating that Pappas and Nissan concluded that "Kramer owed tax on the $9.1 M ***in 2011***"); *see also id.* (noting that Weil commissioned a report concluding that "***in the eyes of federal and state tax authorities, the money should have been paid to [Kramer and Slonecker] in one shot***" (*i.e.*, years before the two were terminated)).)

According to Mr. Nissan, PWP had likely "***screwed up,***[3] ***possibly with Weil's advice at the time***," and Kramer, a member of PWP's General Partner at the time the 2011 Election Forms were drafted, "***could sue [Weil] for not disclosing [this fact]***." (*Id.*) For his part, Mr. Pappas, stated that "***it is in everyone's interest not to raise this.***" (*Id.*) And in fact, this information was never disclosed to Kramer, Slonecker, or this Court. To the contrary, PWP made misrepresentations and concealed this material information in an effort to deceive this Court. *See, e.g.*, N.Y. Rules of Prof'l Conduct 3.3(a)(1) (providing that a lawyer shall not knowingly "make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made").

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[3] For various reasons, the Court could infer PWP did not "screw up," but instead intentionally defied tax regulations.

IV. PWP Conceals Facts and Intentionally Deceives the Court

As set forth above, PWP's counsel knew by no later than December 3, 2015 (almost two weeks before its opposition to their motion was due), that there was no legal basis for withholding Kramer and Slonecker's deferred compensation. Nonetheless, PWP knowingly mounted frivolous defenses in connection with the approximately $10.5 million owed to Kramer and Slonecker—and made numerous ***intentional misrepresentations*** to the Court (and to the First Department) in opposing Kramer and Slonecker's motion and the resulting appeal. Among other things:

- Despite knowing Kramer and Slonecker were owed their deferred compensation, PWP falsely represented to this Court that Kramer and Slonecker are "not entitled to any payment" and that "incentive compensation was never owed to them." (NYSCEF Doc. No. 67 at 5- 6.)

- When Kramer and Slonecker identified the elimination of the "forfeiture for Cause" provision as consideration for their agreement to execute the 2011 Election Forms, PWP falsely represented to this Court and the First Department that the ***tax benefits it knew did not exist*** were the actual consideration for the 2011 deferrals. (NYSCEF Doc. No. 61 at 12 (falsely claiming that, "by extending the deferral of PWP's payment obligation, Kramer and Slonecker extended the deferral of their tax obligations," which was "a substantial benefit" and "constitute[d] ***ample consideration*** for an agreement to defer payment of compensation" (emphasis added); Br. for Plaintiff/Counterclaim Defendant-Respondent PWP Group LP dated Feb. 1, 2017 ("App. Br.") at 5, 21, 25, 27.) Again, these statements were made after PWP's counsel had admitted the 2011 Deferral Forms were invalid.

- PWP falsely represented to this Court and the First Department that the 2011 Election Forms were executed "one year" before the Original Payment Date in a manner entirely "consistent with the applicable tax laws." (NYSCEF Doc. No. 61 at 3, 5; App. Br. at 9.) PWP knew this was not the case.

- PWP falsely represented to this Court at oral argument that Kramer and Slonecker obtained a "tax advantage" by the 2011 Election Forms, insofar as they "didn't have to pay taxes on the income." (Hr'g Tr. dated March 31, 2016, at 13:10-16.) Again, PWP and its counsel knew, based on their own investigation, this statement was false and, instead, Kramer and Slonecker may be subject to IRS penalties as a result of the defective deferral.

PWP and its counsel had actual knowledge of the falsity of these statements at the time they were made but decided to conceal the truth.[4] Indeed, as set forth above, PWP and its counsel knew that (i) the 2011 Election Forms were executed five months after the deadline

[4] It is unclear what information was available to Weil's co-counsel, Boies Schiller Flexner LLP, during this time period.

required by law, rendering the effort at deferral void; (ii) in fact, the manner of the deferral election violated tax laws; and (iii) Kramer and Slonecker received no tax benefit from the purported extensions, which instead exposed them to potential IRS penalties.

V. The Court Relies on PWP's False Statements

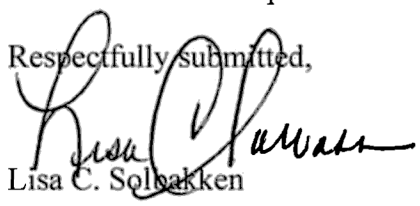
Just as PWP intended, its false statements were in fact relied upon by Justice Kornreich (in front of whom this matter was pending at that time) to deny Kramer and Slonecker's motion for summary judgment. In particular, Justice Kornreich rejected Kramer and Slonecker's argument that the elimination of the forfeiture for Cause provision was consideration for the 2011 deferral, and instead found (as PWP had argued) that Kramer and Slonecker "reduce[d] their tax burden" by executing the 2011 Deferral Forms. (NYSCEF Doc. No. 92 at 18.)

The First Department affirmed on similar grounds, noting that the 2011 Election Forms had enabled Kramer and Slonecker "to defer [their] ensuing income tax obligations, for another five years." *Perella Weinberg Partners LLC v. Kramer*, 153 A.D.3d 443, 447 (1st Dep't 2017). The First Department further held that "[i]t does not appear that the employees electing a further deferment of payment received no consideration for their deferral . . . as they would obtain five additional years of income tax deferral on the compensation." *Id.* at 448. Ultimately, the First Department concluded that "the parties' differing positions as to the circumstances surrounding the execution of the Election Forms give rise to conflicting, reasonable commercial interpretations," and that "extrinsic sources will be necessary for determination of the issue." *Id.*

VI. Conclusion

Kramer and Slonecker have sought to address these points directly with PWP and its counsel. To date, however, PWP has declined to confer with them. For this reason, the undersigned respectfully requests that this Court schedule a conference to address these issues. It is Kramer and Slonecker's hope that an appearance before Your Honor will allow everyone to avoid more time-consuming and unnecessary motion practice, whether this be for further discovery or for some manner of sanction directed at remedying the prejudice following PWP's successful efforts to mislead the undersigned, this Court and the First Department.

Respectfully submitted,



Lisa C. Solbakken

cc: All Counsel of Record (via NYSCEF)
John K. Villa, Esq. (via e-mail)

Exhibit A

BUSINESS EXCLUSIVE

Top law firm Weil Gotshal botched millions in pay for bankers

By Kevin Dugan

August 22, 2019 | 10:26pm | Updated

Michael Kramer and Derron Slonecker of Ducera finance firm
Alex J. Etling

Two powerful Wall Street investment bankers could be on the hook for millions of dollars in back taxes and penalties after one of the world's most prestigious law firms botched their pay packages — and then left them in the dark about the error for years, The Post has learned.

The two bankers — Michael Kramer and Derron Slonecker — face an IRS crackdown on $10.4 million in compensation after their bank's law firm, Weil, Gotshal & Manges, screwed up a deadline for routine paperwork, according to sources and a report Weil commissioned on the matter.

It's unclear what steps Weil took to inform Kramer and Slonecker about the error, but there is evidence indicating that the law firm may have failed to disclose it to the parties — including their client, investment bank Perella Weinberg Partners — in a timely fashion.

The NYC law firm commissioned a report on the error in 2017, which cleared them of wrongdoing, according to a copy obtained by The Post. But the report didn't include meeting notes from two years earlier, when the error was first discovered, where Weil partners discussed "malpractice" — and whether to disclose the mistake to Perella, according to documents and a source familiar with the matter.

The problem started in 2011 when Weil lawyers missed a crucial deadline to defer Perella partners' compensation by five months — meaning

that, in the eyes of federal and state tax authorities, the money should have been paid to the bankers in one shot, according to a copy of the 2017 report.

It wasn't until nearly four years later, in a conference room at Weil's New York headquarters overlooking Central Park, that two Weil partners were first briefed on the error, according to notes and interviews. The two partners were Michael Nissan, the head of Weil's private equity compensation, and Nicholas J. Pappas, a partner in Weil's employment litigation group, according to contemporaneous notes of the meeting obtained by The Post.

"I think they screwed up, possibly with Weil's advice at the time," Nissan allegedly said during the December 3, 2015, meeting, referring to Perella.

"He could sue us for not disclosing it," Nissan said, meaning that one of the bankers could bring a suit for the lack of disclosure.

"How is this relevant to our case?" Pappas then asked, speaking about a lawsuit Weil was handling against the very ex-partners whose compensation had been screwed up.

"I think it is in everyone's interest not to raise this," Pappas added, according to the notes.

It's unclear whether Pappas and the other lawyers at the meeting ultimately made a decision on reporting the error.

I think they screwed up, possibly with Weil's advice at the time

At the time, Weil was at odds with Kramer and Slonecker, who were fired by Perella in 2011 after they tried to poach other employees to start their own investment bank, Ducera Partners. Perella sued them for poaching — and they countersued for their deferred compensation, not knowing it had not been properly deferred.

Kramer and Slonecker still have not received the $10.4 million, which includes more than $9.1 million for Kramer and $1.3 million for Slonecker, according to court documents.

The case, including the counter lawsuit, is still playing out in New York state court.

The next day, on Dec. 4, 2015, the pay bungle was escalated to Jeffrey S. Klein, the head of Weil's employment litigation group.

During that nine-minute meeting, which started at 12:04 p.m., Klein was briefed on the conclusions Nissan and Pappas had come to the day before: "Kramer owed tax on the $9.1 M in 2011 plus a 20% penalty," according to the notes.

"Significant malpractice issue," Klein said, according to the notes. "Worst thing you can do is not disclose it," Klein said, according to the notes.

Klein then said he would speak to Mindy J. Spector, the law firm's general counsel, about the matter, according to the notes.

What happened next is unclear. It's possible that Weil promptly informed Perella of the mistake, but a person familiar with the discussions said the bank was not immediately informed.

Two years later, in 2017, Perella Chief Financial Officer Aaron Hood appeared blindsided when asked about the compensation error during a deposition in the case, according to people with direct knowledge of the questioning.

Lisa Solbakken, a lawyer for Kramer and Slonecker, asked Hood about the deferral error and he wasn't prepared to answer the question, two people with direct knowledge of the deposition told The Post.

He was "shocked and dismayed" to learn about it, one person said.

Solbakken declined to comment on behalf of herself and her clients, Kramer and Slonecker. Representatives for Weil didn't return requests for comment about when they told Perella about the mistake. Spector, Klein, Nissan, Pappas and Hood didn't return messages seeking their comment.

A Perella spokesperson also declined to say when the bank first learned about the error.

"The client's entitled to know what's going on," Richard Zitrin, a legal ethics professor at UC Hastings College of the Law, and a founder of the University of San Francisco's Center for Applied Legal Ethics. "It's unreasonable not to tell them you screwed up."

It was soon after Hood's deposition that Weil commissioned a third-party law firm, the Groom Law Group in Washington, DC, to write a report about the deferral error, one source said.

SEE ALSO

IRS hits East Harlem daycare owner with $6M bill for unpaid income taxes

The 14-page report, which was completed in early May 2018, tentatively clears Weil of wrongdoing and cites a legal contract maneuver that allows parties to change the terms of a contract that were made in error.

In other words, Weil's mistake may still turn out not to have negative tax impact on the bankers, although it remains to be seen what the tax authorities decide.

Depending on the resolution of the case, the error could open the bankers to millions of dollars in back taxes, penalties, and interest — and could open Weil to accusations of legal malpractice, according to legal ethics experts and people familiar with the matter.

Perella could also be on the hook for those costs.

If the two bankers win their lawsuit against Perella and are granted the deferred compensation, however, they will have an incentive to support the idea that it was a harmless error to avoid penalties and back taxes.

FILED UNDER IRS, LAWYERS, PAYROLL, TAX FRAUD